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October 16, 1992

Hon. Dan Morales  
Attorney General of Texas  
Capitol Station  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

RO-469

IN RE: Multiple Opinion Request, In re: Conflicts Between  
CCP Chapter 59 and Local Government Code

Dear Sir:

The drug seizure law in Texas has been moved to different parts of the Texas statutes [Tex.R.Civ.Stat.Ann. art. 4476-15 to Texas Health and Safety Code #481.158, (Vernons 1989) to C.C.P. Chap. 59] and has had various changes from its inception to its present form in C.C.P. Chapter 59.

From the inception of the forfeiture law and through its various changes, we have religiously tried to comply with the law, since our local law enforcement agencies and District Attorney's office have been able to use these funds for badly needed equipment and criminal investigations to fight illegal dope transactions that the Commissioners' Courts would have never provided. At the present time I serve a multi-county district of three (3) counties (DeWitt, Goliad and Refugio Counties) as the District Attorney of the 24th Judicial District. Since early July I have repeatedly called practically every attorney in the Attorney General's office, including Mr. Morales himself, in an attempt to come to Austin to discuss the problems involved in the law, its interpretation, and to get some answers and guidance where the law is not clear or is in apparent conflict with the Local Government Code and other statutes, but have been advised that this is not permitted and that the only way to approach these problems is to request an Attorney General's Opinion in writing.

In my opinion it is extremely difficult, if not impossible, for someone sitting in an office in Austin to write an accurate and "workable" opinion if they do not have the benefit of the actual experience in the field by those who work with the law every day and see and experience the actual day to day problems. Also, in the past the law clearly provided for a district attorney to request an opinion but under the present law (Art. 402.042, 402.043, 402.044 and 402.045) it appears to me that I am not

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not entitled to request an opinion. However, I have been advised by telephone by a member of the Attorney General's office that your office might possibly consent to render opinions on the questions raised under these statutes, if properly requested and presented.

Back in early 1990, Mr. Jim Hodges, the Sheriff of Refugio County, one of the three (3) counties in my District, conferred with Mr. Tom Bullington, attorney for the Sheriff's Association of Texas and formerly a prominent and a well respected Assistant Attorney General, on the proper and workable way to administer and handle the funds under this law, and Mr. Hodges advised me that Mr. Bullington approved the way we were administering the money under this law, and especially the way we handled the funds after forfeiture. To be additionally sure, I wrote the Texas District and County Attorney's Association in regard to the requirements of Art. 59.06, (Disposition of Forfeited Property) and received a reply dated April 24, 1990 which I interpreted to be a complete approval of the procedure we had implemented and were using. Then on January 28, 1992 the Texas District and County Attorneys Association sent out a memorandum setting forth two views on how the drug seizure funds could be administered, one of which we had been following and which was listed as view "(B)" under January 28, 1992 letter, i.e., "the special fund is kept in the depository bank, but is administered exclusively by the attorney for the state and funds are not deposited with the treasurer, for deposit in the county depository.

Under this view we deposit the District Attorney's share of forfeited funds in a bank in each of our three counties, so that the money forfeited in each county is kept in a bank in that same county. The money is put on an interest bearing account and if the fund, in any of the three counties, goes over \$100,000.00 (as it has in Refugio County) we have an agreement with the bank that these public funds in amounts greater than the federally insured \$100,000.00 will be adequately bonded and insured.

We submit a budget for forfeited funds to the Commissioners Court (of each County) before expenditure of those funds which were forfeited in that particular county. [Art. 59.06(D) C.C.P.]. Then, our special funds are audited annually by the Commissioners Court in each of our three Counties [Art. 59.06(g) C.C.P.]. The Commissioners usually have an outside, independent auditor to conduct the audit to insure that we have properly and legally expended the funds for that period of time. After the annual audit, we send a certified copy of the annual audit to the attorney general and governor [Art. 59.06(g) C.C.P.] within 30 days so they

can further inspect our expenditures to insure that the funds were properly used.

Under this procedure the district attorney writes the checks for his office and the sheriff does likewise in regard to his use of funds received by him under the local agreement, and these expenditures are reflected in the annual audit and therefore subject to question, but at a later time when the information is not likely to interfere with an investigation or prosecution or endanger an informer or undercover officer.

Under this procedure there is less likelihood of listing details that would endanger the security of an investigation or prosecution. [Art. 56.06(d)]. However, even under this procedure the security is not completely fool proof as it should be in this extremely dangerous and hazardous line of work.

Example No. 1: The prior DeWitt County Auditor went to the Sheriff's office (while I was in another county) and demanded and obtained the Sheriff's records of names of confidential informers; what they had been paid and for what defendants and future defendants, on not only old cases but on cases that had not yet been filed or were still pending. After my vigorous objection this has not been repeated as far as I know. However, the damage was already done. This act by the DeWitt County Auditor was done in total disregard for C.C.P. 59.06 (d) which states that the budget should not list details that would endanger the security of an investigation or prosecution. In this instance, some of the criminal investigations were washed out but luckily no one was killed.

Example No. 2: My office on July 28, 1992 wrote the Commissioners Courts of each of the three Counties in my district to request additional personnel and equipment to try to keep up with the exploding case load and personnel and equipment in other offices in handling felon criminal cases.

The County Judge of Refugio County replied by letter denying any help and quoted my narcotics account down to the penny, in that county, as of a specific date. The bank denied that they gave out this information as they would be in direct violation of the Banks and Banking laws, Art. 342-705, and contended the County Judge obtained the information from public records in the County Treasurer's office. The Treasurer refuses to answer my letters requesting the source of this information though the answer is obvious. Under the present procedure which we have been using when

I write the checks on the drug seizure money account there is no way the Treasurer could have known or furnished the exact amount for a specific date since she would only have our budget for forfeited funds to the Commissioner's Court [C.C.P. art. 59.06(d)] and our annual audit [C.C.P. art. 59.06(g)]. Under this system we still have to accurately account for every penny spent but it is on an annual bases and in this way most of the cases have been filed or handled and the likelihood of endangering the security of an investigation or prosecution or the life of an informer or officer, while still present, is not so great.

On the other hand, under view "A" the district attorney's and sheriff's special funds are kept with the county treasurer and administered by the treasurer and auditor under the direction of the attorney for the state (§ 116.002 L.G.C.; § 140.003 L.G.C.). Under this procedure where it has been proposed that DeWitt County be the depository for the three (3) counties, every check would be issued and signed by the Auditor and also signed by the Treasurer and District Attorney (or Sheriff, as the case may be). Narcotics and dope investigations are popular subjects for conversations, gossip and coffee talk and the Treasurers offices and Auditors offices, in my three (3) counties, are no exception.

If the District Attorney or Sheriff has to have every check drawn and signed by the Auditor's office, Treasurer's office as well as the District Attorney or Sheriff and if the check was to some informer or for some type of detection equipment, it would be common knowledge all over the whole courthouse within an hour and over the whole town before the day had ended just from gossip and the local "grapevine". In addition anybody (whether law abiding or the worst crooks or criminals) could request and see this information as public records and we would be lucky if someone was not killed within six months and the crook would know what was used by the law enforcement people and the results would be negative with the lack of security in narcotic investigations and prosecutions. As a proposed remedy, one of the less informed auditors suggested that they just issue me a check for "cash" and then use it in narcotic investigations. I might be a dumb, country lawyer and D.A., but I'm not that stupid! Under this proposed procedure I'd be accused of all sorts of illegal acts in short order. In Refugio County alone we have probably done over one million dollars in forfeitures in each of the last two years. Just this last year there was a single seizure of almost one million dollars and we ended up sending it to the Feds to handle, at least in part, due to the loopholes and problems with the State seizure law that were not present under the Federal law. We are fighting

big money crooks and if they have ready access to practically every thing we do, as they would if we are required to operate as set out above, then the battle is lost before we ever get started and we will be exceedingly lucky if informers, good officers and others are not killed under this procedure.

Question No. 1: Because of the security problems and other problems involved, can view "B" as set out in the January 28, 1992 letter and memorandum dated January 28, 1992 from the Texas District and County Attorney's Association be approved as appropriate and proper in the administration of forfeited funds? Or in the alternative, can both view "A" and "B" be approved so that the effected official would have an option to use either view?

The view "B" set forth in the TDCAA letter and memorandum of January 28, 1992 presents the only logical and workable way to administer forfeited drug funds. A very good and workable argument is presented in that memorandum and is the only view which will logically work in real life as well as in theory!

The view "A", as also voiced by the September 8, 1992 Attorney General Opinion No. DM-162, will work a disaster to effective law enforcement and to C.C.P. Chapter 59 in regard to Forfeiture of Contraband. This plan or view might look good to a dreamer or someone who would sit in a fine government office and not have to worry about what happened to the poor law enforcement official in the field and who did not have to worry about getting killed by some dope dealing gang who got this information and the man's identity through the county treasurer's and auditor's records. But in real life the view "A" and the attorney general opinion No. DM-162 is a disaster to those trying to fight the war on drugs.

The above attorney general opinion cites State v. \$50,600.00, 800 S.W.2d 872 which even the Judge writing the opinion recognizes is a decision under a "repealed" law (V.A.C.S. art. 4476-15, and about the only definitive information that one can gain from that case is that property seized by a county sheriff's department could only be forfeited to a county, rather than to the sheriff's department and under the present statue, this is no longer the law. [See C.C.P. art. 59.05(e)] "... the judge shall forfeit the property to the state, with the attorney representing the state as the agent for the state, ...".

It is submitted that those writing the attorney general opinion No. DM-162 should re-examine their ruling after taking a real thorough and exhaustive examination of not only the

authorities but of the effect their decision will have upon the forfeiture law and whether their opinion will hinder rather than help the proper and successful use of this law by the people out in the field who are trying to make it work.

**Question No. 2:** Proper Procedure For Handling Seized Contraband Funds in Multi County District.

Under view "B" of the TDCAA memorandum dated January 28, 1992 I kept the funds seized in each county in a separate account and in a separate bank in each county and submitted a proposed budget to each set of county commissioners in each county and the annual audit was handled in each county in the same manner. If permission for approval of a salary was requested, a request was made of the commissioner's court of each county even though the salary was to be taken from funds forfeited from one county.

If we are required to follow view "A" where the judges designate one county treasurer and auditor to handle the funds of all the counties (L.G.C. #140.003) can view "B" be used in regard to only the district attorney signing checks and keeping the records of same, which is workable, or will we be required to use view "A" with the auditor, treasurer and district attorney signing the checks and the auditor and treasurer keeping the records, which will almost paralyze proper law enforcement use of these funds?

**Question No. 3:** At present, Refugio County's forfeited funds are quite large, while forfeited funds for DeWitt and Goliad are very small and at times almost non-existent. Under view "A", if the Judges designate the DeWitt County Treasurer and Auditor to handle all the funds from all the other counties:

**Question No. 3-A:** Should the funds from the other Counties all be transferred to DeWitt County or am I permitted to keep the funds in a bank in the county where they were forfeited and who is authorized to write the checks and keep the records up to the time of the annual audit?

**Question No. 3-B:** On salaries (under C.C.P. art. 59.06(4)(D)), should the district attorney obtain permission from just the DeWitt County Commissioners where all the money is transferred or from the Refugio County Commissioners where all the money for the salaries was generated, or from all three sets of County Commissioners?

**Question No. 3-C:** In regard to the submitting of a budget to the commissioners court [C.C.P. art. 59.06(4)(d)], do we submit a

budget only to the Refugio County Commissioners' Court where practically all the money is generated or to the DeWitt County Commissioners where all the money is transferred under (L.G.C. §140.003) so that the DeWitt County Commissioners' Court would be deciding whether to approve or oppose requested salaries to be taken from Refugio County where all the money was generated; or would we submit budgets to all three sets of Commissioners?

Question No. 3-D: In regard to the annual audit requirements [C.C.P. art. 59.06(4)(G)], should the audit be sent in to the governor and attorney general from each of the three counties or only from DeWitt County which the Judges designated for managing the entity's funds (L.G.C. §140,003)?

Question No. 3-E: Who writes checks, pays the bills, keeps the monthly statements on district attorney's forfeited funds? Under View "B", the district attorney writes the check, processes the bank statements, but accounts for same once a year at the audit or more often if an amended budget is submitted and this is done in all three (3) counties. Under view "A", does the district attorney continue to write the checks, pay bill and keep the monthly statements, as set forth above, or does the Auditor, Treasurer and District Attorney all three have to sign the checks with the statements, etc., going monthly to the Auditor and Treasurer of DeWitt County?

The danger to the lives of the informers under cover officers, or security to active investigations and prosecutions are set out above. If this procedure is required and if this procedure must be followed, I will be surprised if someone is not killed within six (6) months and if investigations and prosecutions are not compromised and defeated from improper disclosure of information which is discouraged in C.C.P. art. 59.06(4)(d).

Question No. 4-A: Is the County or municipal authority, depending on which peace officer seizes the property, responsible for insurance on seized real property that cannot be moved to a location where the real property is secured? If not, who is?

Question No. 4-B: Is the County or municipal authority, depending on which peace officer seizes the property, financially responsible for locks, security tape and other materials to secure seized real property pending disposition by the Court? If not, who is?

Question No. 4-C: In regard to non-real estate seized property, is the County or municipal authority, depending on which peace officer

seizes the property, responsible for the expense of (1) placing the property under seal; (2) removing the property to a place ordered by the Court; or (3) under C.C.P. art. 59.03(4)(c)(1)(2)&(3)? If not, who is?

**EXAMPLE:** A number of deputy sheriff's obtained a search warrant for narcotics and narcotic trafficking at a residential home and found narcotics, a large number of televisions, stereos, and VCR's, hi-fi's, a large quantity of expensive jewelry and other expensive appliances and equipment in the house and obtained confessions admitting that the home and all contents were purchased with money obtained from narcotic sales or were received in trade for narcotics. The deputy sheriff in charge seized the house and all contents; purchased locks to secure the doors and purchased the yellow tape and signs notifying all to not enter, etc. He then went to the County Auditor and requested that insurance be obtained to cover the house and contents pending final court action and requested that he be refunded for his personal funds used to purchase the locks, tape, signs, etc. and the Auditor refused to obtain insurance on the house and refused to refund the Deputy for his purchases of the locks, and other material to secure the house. A few days or weeks later the house was burglarized and all the expensive appliances and equipment were removed from the house and stolen. The Auditor acknowledges that the insurance and other items were necessary to comply with C.C.P. art. 59.03(c)(1)(2)(3) but contended that none of the items should be the expense of the County.

The Deputy Sheriff is a County officer and a peace officer, and was acting as an agent for the County. The statute states that "...A peace officer who seizes property under this Chapter, C.C.P. art. 59.03, (c)(1)(2)&(3), has custody of the property,...". From reading the statute it clearly appears that the County should be responsible and liable and that the Deputy Sheriff should be entitled to be paid for spending his private funds to properly do the job he was required by law to do. It further appears that under this statute the County should be liable and responsible for the safe keeping and security of the home and contents until the Court has decided who was entitled to the house and its contents including insurance. Is the County liable for the above and if not, then who is?

**Question 4-D:** The same question as to Question 4-C is submitted in regard to storage and safe keeping of seized vehicles or other personal property, other than the narcotics.

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Dan Morales, Esq.  
October 16, 1992

Copies of the TDCAA letter of April 24, 1990 and memorandum of January 28, 1992 are attached for your information and examination.

Respectfully submitted,

/S/

Wiley L. Cheatham

WLC:sb

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